Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-
No. 24(2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Merrill J. Chapman,

Petitioner,

v.

Smith Barney, Harris Upham & Co., Inc.,

Respondent.

- Supplemental Brief -

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Merrill J. Chapman
Petitioner pro se
49 Chambers St.
New York, N. Y. 10007

BEST AVAILABLE COPY

24pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUPPLEMENTAL BRIEF	1
THE COURT SHOULD DEFER CONSIDERATION OF THE INSTANT PETITION AND COMBINE IT WITH THE SMIGA PETITION FOR CERTIORARI.	3
THE SECOND CIRCUIT AFFIRMANCE IN SMIGA IGNORED THE FACT THAT ITS OPINION MANDATED VACATUR OF ANY SANCTION AGAINST PETITION.	4
THE SUPREME COURT MUST HALT THE UNCONSTITUTIONAL CONDUCT OF THE SECOND CIRCUIT.	11
AN APPLICATION BY PETITIONER FOR ADMISSION TO THE SUPREME COURT BAR WILL RAISE THE DUE PROCESS ISSUE.	17
SUMMARY AND CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Adamsons v Wharton, 2d Cir, Slip Op No. 1326, August 21, 1985	2,11
Burlington Coat Factory etc v Esprit de Corps et ano, 2d Cir, Slip Op No. 957, August 6, 1985	2
Dean Witter Reynolds v A. Lamar Byrd, ___US___, 53 LW 4222, March 5, 1985	8
Interocean Shipping Co, v National Shipping & Trading Corp., 462 F2d 673 (CA2/72)	9
Karavas v Atlantica. 588 F2d 1 (CA2/78)	9
Mahnich v Southern S.S. Co., 321 US 96, 112-113 (1944)	15
Mohasco Corp. v Silver, 447 US 807, 826	16
Moses H. Cone Memorial Hospital v Mercury Construction Corp., 460 US 1 (1983)	8
Roadway Express v Piper, 447 US 752 (1980)	14,16
Sierra Club et al v US Army Corps of Engineers et al, 2d Cir Slip Op No. 304, 315, September 11, 1985	12
Southland Corp. v Keating, ___US___, 104 S Ct 852, 79 LEd 2d 1 (1984)	8

Page

Smiga v Dean Witter Reynolds, 2d Cir Slip Op No. 798, June 28, 1985, Rehearing Denied, September 10, 1985 2,4,5,6,7,13,16,20

Tedeschi v Smith Barney, Harris Upham & Co., 579 F Supp 657 (SDNY 1984) 4 16,17,20

Varley v Tarrytown Associates, 477 F2d 208 (CA2/1973) 6

Waarden v Smith, 532 F2d 874 (CA2/1976) 9

Statutes

U. S. Constitution, Amendment 5 18

9 USC 4, 9 6,7,8,9

28 USC 1927 2,5,14,16

Rules,Regulations

Rule 38, Fed Rule App Proc 4,14

Other

REPORT, Committee on Federal Courts, Association of the Bar of the City of New York, (Appendix "B" annexed to Petition for Certiorari) 4,10,19

No. 240

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Merrill J. Chapman,

Petitioner,

v.

Smith Barney, Harris Upham & Co., Inc.,

Respondent.

- Supplemental Brief -

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This Supplemental Brief is provided to the Court under the provisions of Rule 22.6 in order to call attention to a new case and other intervening matter not available at the time of the petitioner's last filing.

The new cases which warrant the Court's attention are: Smiga v. Dean Witter Reynolds, 2nd Circuit Slip Opinion No. 798, June 28, 1985, Rehearing Denied, September 10, 1985; Burlington Coat Factory etc v. Esprit de Corps et ano, 2nd Circuit Slip Opinion No. 957, August 6, 1985 at 5488 citing Eastway Construction Corp. v. City of New York; and Adamsons v. Wharton, 2nd Circuit Slip Opinion No. 1326, August 21, 1985.

The focus of this Supplemental Brief is the Smiga case, supra, now reported at 766 F2d 698. The instant petitioner-attorney, Merrill J. Chapman, was the attorney for Ms. Smiga and likewise sanctioned by a different district court under 28 USC Sec. 1927. The Second Circuit affirmed both the judgment against Ms. Smiga and the monetary sanction of $1700.23 leveled by the district court against this attorney.

THE COURT SHOULD DEFER CONSIDERATION OF THE INSTANT PETITION AND COMBINE IT WITH THE SMIGA PETITION FOR CERTIORARI.

The identical issue of due process is presented in both the instant Chapman petition and the forthcoming petition for certiorari to be filed by both Ms. Smiga and attorney Chapman. The clear denial of due process to Ms. Smiga is the only added element on appeal. Inasmuch as that denial sounds in the decision of the Second Circuit -- with little or no reference to the original judgment of the court below -- the fact pattern attending her petition lends itself perfectly to a combined consideration of the due process issue raised by the two petitions with comcomitant judicial economy.

The Court is respectfully requested to defer its consideration of the instant Chapman petition and to consider the two petitions for certiorari jointly upon the filing of the Smiga Petition.

THE SECOND CIRCUIT AFFIRMANCE IN SMIGA IGNORED THE FACT THAT ITS OPINION MANDATED VACATUR OF ANY SANCTION AGAINST PETITIONER.

The Smiga decision underscores the criticism of the Second Circuit by the Committee on Federal Courts of the Association of the Bar of the City of New York for the "practice" of denying fundamental fairness and due process to attorneys. In the Tedeschi case from which the instant Chapman Petition is drawn, the 2nd Circuit emblazoned its stamp of approval upon denial of due process by a district court below by increasing a monetary sanction without notice or legal justification, purportedly under Rule 38, Federal Rules of Appellate Procedure.

In Smiga, incredibly, the Court itself contrived to deny fundamental fairness and due process to both this attorney and his client by "manufacturing" out of thin air a controlling "order" upon which affirmance of the district court was then based.

The issue in Smiga -- to be fully briefed in the forthcoming Petition for Certiorari -- must be touched upon in this Supplemental Brief. Very simply, the court of appeals agreed with this petitioner that the district court below was without jurisdiction to confirm the arbitration award at issue. This point had been argued in the district court and again on appeal.

The $1700 monetary sanction imposed by the district court is therefore totally unwarranted under 28 USC Sec. 1927 where accurate arguments were advanced in opposition to an award confirmation. Nevertheless, the 2nd Circuit failed and refused to reverse such sanction. The affirmation of the judgment against Ms. Smiga on an entirely different and unknown basis is consequently an irrelevancy and mandates vacatur of the attorney sanction.

The accuracy of the legal arguments advanced by this Petitioner in the Smiga

case was conceded by the 2nd Circuit in these words:

> We agree with Smiga that no submission agreement was executed and no agreement was entered explicitly granting a court the right to enter judgment. In our view, nevertheless, the equivalent of an order to compel arbitration exists herein and therefore we believe the district court had jurisdiction to confirm the award.
>
> ***
>
> However, we find that, assuming an order to compel was the proper procedure, the district court's order denying Smiga's motion to stay arbitration was essentially the equivalent of an order by the district court to compel arbitration. (Slip Opinion, Smiga v. Dean Witter Reynolds, No. 798, 2nd Cir at 4949).

The panel of the 2nd Circuit which agreed that the court below lacked jurisdiction to confirm the arbitration award against Ms. Smiga was bound to so find by the precise language of Section 9 of the Arbitration Act, 9 USC and by its own controlling precedent. Thus in Varley v. Tarrytown Associates, 477 F2d 208 (CA2/1973) the 2nd Circuit held:

> In view of the explicit language of Section 9 of the [Arbitration] Act requiring such agreement ["that a judgment of the court shall be entered upon the award..."] and finding none, we have no alternative but to reverse. (Id. at 210)

The Smiga panel likewise found no such agreement and should have reversed. (See, Slip Opinion at pp. 4948 and 4949). Instead the court invoked legal legerdemain and a judicial alchemy found in no book of law and converted an unappealable order denying a stay of arbitration into an order to compel arbitration (which is appealable) nearly two years later. The denial of procedural due process to Ms. Smiga is readily apparent -- the Arbitration Act gives her the right to a jury trial where, as here, she disputes the existence of an arbitration agreement.

In addition to the arbitrary conversion of an unappealable denial of a stay order into an appealable order to compel arbitration, ex post facto, there

was at no time any petition or motion made by the opposing litigant to compel arbitration. How, indeed, can an order compelling arbitration come into existence without adherence to Section 4 of the Arbitration Act? 9 USC Sec. 4 provides:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed ....

This Court recently decided three cases settling various issues relative to arbitration controversies. Each case was precipitated by the statutory motion or petition to compel arbitration. See, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 US 1 (1983); Southland Corporation v. Keating, ___US___, 104 S Ct 852, 79 LEd 2d 1 (1984) and last but certainly not least, Dean Witter Reynolds v. A. Lamar Byrd, ___US___, 53 LW 4222, March 5, 1985. The failure to bring

on a Section 4 petition to compel Ms. Smiga to arbitrate is a fatal jurisdictional defect, deprived her of a statutory procedure and consequent denial of a precious constitutional right not to be deprived of property without due process. And what of Ms. Smiga's appeal as of right to which she would have been entitled two years ago had she known an order to compel arbitration had come into existence? 2nd Circuit precedent grants her that right ("an order compelling arbitration under 9 USC Sec. 4 is appealable as a final order." Karavas v Atlantica, 588 F2d 1 {CA2/78}; Waarden v Smith, 532 F2d 874 {CA2/76}; Interocean Shipping Co., v National Shipping & Trading Corp., 462 F2d 673 {CA2/72}) but the same circuit now has issued the functional equivalent of a gag order. She has been bludgeoned into silence without an iota of due process.

Despite the "evil" "practice" of the 2d Circuit toward attorneys, this denial of due process to Ms. Smiga comes as an astonishment and a gloomy harbinger for the future of the Constitution in the 2d Circuit.

The conclusion is inescapable that the 2nd Circuit has embarked on a reckless, benighted and unconstitutional campaign against litigants and members of the bar. Its motive is murky; however, it is clear that this "evil thing" (as charged by the prominent member of the bar mentioned in the instant Petition for Certiorari at page 18) must be addressed by this Court. This conduct of the ?nd Circuit has now become a national scandal.

The stinging criticism leveled at the 2nd Circuit by the Report of the Association of the Bar of the City of New York (REPORT) -- annexed to the Petition for Certiorari heretofore filed -- is now perceived to be a polite understatement.

THE SUPREME COURT MUST HALT THE UNCONSTITUTIONAL CONDUCT OF THE SECOND CIRCUIT.

The REPORT of the City Bar, issued in June of this year, has had no evident impact upon the Second Circuit. It continues to flail and threaten selected attorneys and litigants in recent weeks. It is determined to pursue an authoritarian and totalitarian stance in outright defiance of this Court, instructions of Congress and the fundamental precepts of the United States Constitution. The Smiga decision is but one of several that have been cited at the beginning of this paper. A tragic footnote to the Adamsons case is that the 75 year-old sole practitioner represe ting Dr. Adamsons died a few days after the 2d Circuit decision. His secretary states the death was the direct result of the harsh sanction imposed.

In the context of this discussion, a decision of the 2d Circuit within recent

days as to the famous (or infamous) "Westway" project here in New York City (Sierra Club et al v. U. S. Army Corps of Engineers et al, 2d Cir Slip Opinion 304, 315, Sept. 11, 1985) contains challenging language. The court opened its discussion with these words:

> A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief. This case is capsulized in that solitary simile.

and then stated:

> No court should allow the use of semantics to succeed in an attempt at glossing over an environmental violation [due process deprivation?]. Neither Judge Griesa nor we are required to defer to the [Army] Corps' [of Engineers] Orwellian-like "doublespeak,"...
>
> ***
>
> Thus, the change ... required an explanation and that explanation should have been in the final report. Neglecting to include it illustrates again the insight of Franklin's maxim that "a little neglect may breed great mischief."

The 2d Circuit itself is guilty of just such "doublespeak". In Smiga, a stay denial of "yesterday" viewed through the 2d Circuit "looking glass" became "todays" order to compel -- without a motion, without notice, without authority in law -- and without an explanation. Yet to be heard is an explanation of how an order can be both appealable and non-appealable.

Upon such doubletalk, Ms. Smiga is deprived of $13,000 and her attorney, who correctly argued that the district court lacked jurisdiction to enter that judgment, is sanctioned. Mirabile dictu!

Except for striped bass in the Hudson River, due process is dead in the 2d Circuit. And attorneys are whipping boys and 5th class citizens. It is time for the Supreme Court to call a halt to the "evil" practices of that Circuit.

These two cases involving attorney Chapman have the promise and ingredients to

become the Watergate of the 2d Circuit; the Dreyfus Affair of the legal system. The "cover-up" of unconstitutional deprivations of property and the denial of due process to United States citizens is a national scandal. The time is now for the Supreme Court to address the issue and fix the bounds of Rule 38 which does not explicitly allow monetary sanctions against attorneys; to compel strict adherence to the congressional mandate accompanying 28 USC 1927 that a "court is to afford the attorney all -- not a few or some -- all appropriate protections of due process available under the law;" and to make certain that this Court's instruction in Roadway Express v Piper, 447 US 752, 767 that "attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." is no longer spurned.

The rampant neglect of fundamental fairness and due process concepts by the 2d Circuit has resulted in "great mischief" with no end in sight.

Forty years ago Justice Roberts of this Court foresaw "great mischief" and "evil" where proper adherence to authority was not followed. In Mahnich v Southern S.S. Co., 321 US 96, 112-113 (1944) he made a strong argument in dissent against what he considered the "evil resulting from overruling considered decisions." and warned that if federal courts do not feel bound to follow and apply the law as announced by the Supreme Court, "the law becomes not a chart to govern conduct but a game of chance." Justice Roberts suggested:

> [Litigants] will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute.

As recently as 1980 this Court in similar vein announced in Mohasco Corp. v Silver, 447 US 807, 826:

> [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

In both Tedeschi (Chapman) and now Smiga, the abject failure and refusal of the 2d Circuit to follow this Court and the Legislature warrants certiorari. This Petitioner was afforded none of the due process requirements explicated by the Constitution, by this Court in Roadway and Mohasco or by the Congress in relation to 28 USC 1927.

This unconscionable inquisition of this Petitioner in these two cases should be responded to by this Court -- on behalf of the entire bar and all citizens -- by granting certiorari on both and restoring due process rights and privileges in the 2d Circuit.

AN APPLICATION BY PETITIONER FOR ADMISSION TO THE SUPREME COURT BAR WILL RAISE THE DUE PROCESS ISSUE.

In order to proceed with Ms. Smiga's Petition for Certiorari (due within 90 days of September 10, 1985) Petitioner Chapman will have to apply for admission to the Supreme Court Bar. Question 12 on the application asks if the applicant has been disbarred, suspended or reprimanded. The district court in Tedeschi stated that its sanction carried with it "condemnation of [Chapman's] professional conduct." (Petition, Appendix "A", p. 9) and that he was "reckless and mendacious" (Id at p.11).

This Court should know that on the oral argument of the Tedeschi (Chapman) appeal in the 2d Circuit, Petitioner demanded of the Panel that it commence disbarment proceedings. The demand was greeted with stony silence. So also was the demand for an evidentiary hearing on June 7, 1983 in the district court and then

again three times in the court of appeals (Petition, p. 15).

Why no evidentiary hearings? The 2d Circuit can't stand the heat of a full-blown exposure of the false accusations and distortions of the record by an overreaching district court; it can't tolerate the illumination of the accusations never noticed to Petitioner; it can't bear the embarrassment of events twisted beyond recognition by the lower court, whether deliberate or not; nor the glare of publicity on the failure to allow a reply to an affidavit requesting $50,000 in attorney's fees (Petition pp. 9-14) The truth is that the 2d Circuit has been bullying and intimidating members of its bar for some time in a misguided campaign to diminish its case load. Due process has given way to expediency; the 5th Amendment is an anachronism. But-- even Alfred Dreyfus had a hearing. Watergate.

Therefore, Petitioner's answer to Question 12 on the Application will be now and ever that no reprimand is possible under the U. S. Constitution, where: unnoticed accusations were made; no evidentiary hearings were held; hearings were denied; and -- to the contrary -- Petitioner was defamed by the 2d Circuit.

SUMMARY AND CONCLUSION

It would be singularly appropriate for this Court to grant certiorari in both this situation and the Smiga case and combine the appeals. Both cases reflect ongoing practice decried by the REPORT of the City Bar. The opposing attorneys each in turn referred to the other case on appeal, blatantly appealing to and seeking to, prejudice, Petitioner. The 2d Circuit -- over vigorous objection by Petitioner -- schedduled the appeal hearings within two days of each other. This was an act of outright brutality, to say nothing of the tandem

scheduling of the appellate briefs. Be that as it may, Smiga underscores the "game of chance" going on in the 2d Circuit with the resultant "doubt and disbelief" that justice and due process are available in the 2d Circuit. Except, that is, for the fish and the favored.

The egregious denial of due process to Petitioner in the Tedeschi case -- now demonstrated to be a pattern in the 2d Circuit -- must now be addressed by this Court. Attorneys and litigants alike, nationwide, have a right to know now where the judicial system is going.

Petitioner respectfully prays that the Court grant Certiorari on this Chapman Petition and combine it with the forthcoming Smiga Petition.

Dated: September 24, 1985
New York, New York

Merrill J. Chapman
Petitioner, Pro Se
49 Chambers St. #820
New York, N. Y. 10007